INDIGENOUS RIGHTS AND CLAIMS FOR FREEDOM IN SETTLER STATES[1]

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Abstract

Scholars such as Joyce Green and James Tully advance that Indigenous peoples, in settler states like Canada, are engaged in an ongoing, centuries-old struggle for freedom. Rights are an important instrument for securing and protecting freedom. However, a survey of the scholarship on freedom reveals a significant degree of contestation surrounding the nature and scope of this very basic human interest. In this paper, I examine three different conceptions of freedom with a view of assessing these conceptions' suitability as a cornerstone of Indigenous rights. Specifically, I analyze a liberal conception of freedom (i.e. Isaiah Berlin's work on negative liberty), a republican conception (i.e. Philip Pettit's work on liberty as non-domination) and an Indigenous conception (i.e. John Borrows' work on liberty as mobility). The purpose of this analysis is twofold. First, I aim to outline the types of rights and duties underpinned by each conception of freedom. Second, I aim to make the case that the liberal and republican conceptions are unsatisfactory, while Borrows' conception shows some genuine promise, assuming the goal is to advance a set of rights and duties that would be useful in the Indigenous struggle for freedom.

Introduction

Rights are important because people associate them with justice. While there are a number of different theories of rights, Joseph Raz advances that rights are best

[1] In this work, I employ "Indigenous nations/Indigenous peoples" to refer to the distinctive national groups that are currently populated by the descendants of the original inhabitants of the country we now call Canada. I realize that many scholars employ the phrases "Aboriginal peoples" or some variant thereof. In my view, Gordon Christie is correct that the latter way of referring to the populations in question is a Euro-Canadian convention and so can be problematic (Gordon Christie, "'Obligations', Decolonization and Indigenous Rights to Governance" (2014) 27 Can JL & Jur 259 at 259). As a result, when an alternative to "Indigenous nations" is employed in this piece, it is usually in the context of a direct quotation, where my intent is to accurately reproduce another scholar's text, or when employing "Indigenous nations" lacks the requisite degree of precision. Also, I employ the terms "freedom" and "liberty" interchangeably. Of course, these terms are not synonyms and have quite distinctive etymological origins (Hanna Fenichel Pitkin, "Are Freedom and Liberty Twins" (1998) 16:4 Political Theory 523). However, they are often treated as interchangeable in the political philosophy scholarship (see e.g. Isaiah Berlin, *Liberty*, ed by Henry Hardy (Oxford: Oxford University Press, 2002); Quintin Skinner, *Liberty Before Liberalism*, (Cambridge: Cambridge University Press, 1998); Eric Nelson, "Liberty: One Concept too Many?" (2005) 33:1 Political Theory 58). I follow common practice in this paper.

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understood as a bridge that connects duties to important human interests.[2] More specifically, Raz argues that a person has a right when that person has an interest that is capable of imposing a duty on some other person.[3] Basically, we can summarize Raz's position as the view that "[r]ights are grounds of duties in others".[4] Raz is certainly not the only, or even the first, philosopher to hold this view. Indeed, in his famous essay, "On Liberty", J.S. Mill presents a very similar position on the relationship between rights, duties and interests.[5]

Assuming that Raz is correct about the connection between rights, duties and interests, rights-based conflicts can come in at least two different forms. First, rights-based conflicts can turn on instances where two or more rights and their corresponding duties generate competing demands. According to Jeremy Waldron, "[w]hen we say rights conflict, what we really mean is that the duties they imply are not compossible".[6] In other words, two or more duties, generated by the existence of specific rights, cannot be simultaneously discharged. The following example may clarify this last point. Let's assume that people have a right to protest, and let's say that a person may exercise this right to protest by standing in front of a government building and holding up a placard criticizing a particular law or government policy. Given what we've already said about rights, this right to protest creates a duty, held by the rest of us, not to interfere with the protester's actions. Now, we will also have to acknowledge that the people who walk past the government building also have rights. Each person has a mobility right which creates a duty of non-interference. As a result, people have a duty not to interfere with other people's ability to get around. However, the protester's actions, at least to some degree, impede the mobility rights of each passer-by. But, if

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[2] Joseph Raz, *The Morality of Freedom,* (New York: Oxford University Press, 1986). Two popular alternative accounts of rights include Robert Nozick's work which argues that rights are "side-constraints" (Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974)) and Ronald Dworkin's work which advances that rights are "trumps" (Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977). In this paper I employ Raz's view not only because I think it most closely matches our common-sense intuitions about rights but also because it centres on the relationship between interests, rights and duties. This is an important consideration because the analysis in this paper aims to illustrate how one's understanding of liberty, an important human interest, impacts the type of Indigenous rights one is able to defend.

[3] Raz, *supra* note 2 at 166. (Raz offers the following technical definition of a right: "'X has a right' if and only if X can have rights, and other things being equal, an aspect of X's wellbeing (his interest) is a sufficient reason for holding some other person(s) to be under a duty").

[4] *Ibid* at 167.

[5] J.S. Mill "On Liberty" in Mark Philip and Frederick Rosen, eds, *John Stuart Mill: On Liberty, Utilitarianism and Other Essays* (Oxford: Oxford University Press, 2015) (specifically, Mill states that "the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists, first, in not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights" at 73).

[6] Jeremy Waldron, "Rights in Conflict" (1989) 99:3 Ethics 503 at 506 (Waldron offers the following explanation for his claim that rights conflicts are really about the inability to discharge competing duties: "Two people, A and B, may be said to have rights which conflict if some interest of A is important enough in itself to justify holding some person, C, to be under a duty whose performance by her will not be possible if she performs some other duty whose imposition is justified by the importance of some interest of B" at X).

we act to remove the protester (and so discharge the duties generated by other people's mobility rights) we will fail to discharge our duty to the protester. And so we are faced with a moral dilemma. Which duty do we discharge? Which right do we violate? In this case, the rights-based conflict is concerned with figuring out how to justly deal with these sorts of moral dilemmas.

There is a second type of rights-based conflict. People can disagree about what is entailed by a particular right (i.e., the nature and scope of the right and its corresponding duties), even when they agree on the important human interest that that right is supposed to protect. For example, assuming that we agree that practising one's religion is an important human interest that is substantial enough to underpin a right, we can still disagree about what sorts of actions this right mandates, allows or forbids. Does a right to practise one's religion allow one to discriminate against particular groups of people as the owners of Ashers Baking Company argued when they refused to make a cake for a same-sex wedding in Northern Ireland?[7] Notice that the argument here is not about competing rights and their corresponding duties. Instead, the argument is about competing understandings of the meaning of the important human interest underpinning a right. The owners of the bakery in Northern Ireland have one vision of what it means to practise one's religion (i.e. the types of duties this right imposes on others) while their critics have a very different vision.

In this paper, I focus on this second type of rights-based conflict. Following the lead of scholars such as James Tully, I begin with the proposition that Indigenous rights claims in settler states, like Canada, are best understood as claims for freedom.[8] Indeed, many Indigenous scholars from different theoretical perspectives take the same position. In a seminal piece on the rights of Indigenous peoples in Canada, Joyce Green characterizes the conflict between Indigenous peoples and the settler state as "the struggle for a measure of liberation".[9] In his popular book, *Wasase*, Taiaike Alfred advances that "[t]here are many differences among the peoples that are

[7] Henry McDonald, "Northern Ireland bakers guilty of discrimination over gay marriage cake" *The Guardian* (19 May 2015), online: < https://www.theguardian.com/society/2015/may/19/northern-ireland-ashers-baking-company-guilty-discrimination-gay-marriage-cake>.

[8] James Tully, "Struggles over Recognition and Distribution" (2000) 7:4 Constellations 469. There is certainly a debate among scholars about the nature and scope of Indigenous rights and so not everyone agrees that these rights are about securing freedom. For example, some scholars advance the idea that Indigenous rights are best characterized as distributive justice rights (Courtney Jung, *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas*, (Cambridge: Cambridge University Press, 2008)). Using this characterization, Indigenous rights claimants are portrayed as seeking a bigger piece of the Canadian socio-economic pie. Alternatively, other scholars put forward that Indigenous rights are correctly understood as minority cultural rights (Avigail Eisenberg, "The Politics of Individual and Group Differences in Canadian Jurisprudence" (1994) 27:1 Can J of Political Science 3). From this perspective, Indigenous rights claimants are portrayed as seeking special programs or policies that aim at preserving the cultural distinctiveness of their communities.

[9] Joyce A Green, "The Difference Debate: Reducing Rights to Cultural Flavours" (2000) 33:1 Can J of Political Science 133 at 134.

indigenous to this land, yet the challenge facing all Onkwehonwe [original people] is the same: regaining freedom and becoming self-sufficient".[10]

Given the account of rights employed in this paper (i.e. one that connects rights to interests and duties), these scholars' views would mean that we should conceptualize Indigenous rights as rights that create duties that aim at protecting the liberty of Indigenous people. However, the claim that Indigenous rights aim at protecting liberty creates a problem because people hold very different beliefs about the meaning of this basic human interest. Indeed, the multiplicity of scholarly views raises serious questions about which understanding of freedom ought to underpin Indigenous rights. How we answer these questions matters because one's position on the meaning of liberty will shape one's position on the nature and scope of Indigenous rights, as well as the corresponding duties.

In this paper I focus on three scholarly accounts of freedom and the case of Indigenous peoples in Canada. More specifically, I examine Isaiah Berlin's work on negative liberty, Phillip Pettit's work on republican liberty, and John Borrows' work on freedom as mobility. My analysis demonstrates that the first two conceptions of liberty are an inadequate foundation for Indigenous rights. Negative liberty is problematic because, first, it cannot generate rights that would enable Indigenous peoples in Canada to challenge their status as citizens of the settler state, and second, because it cannot generate rights that would create a secure form of negative liberty. Republican liberty is problematic because it cannot generate rights that address the wrong of usurpation and so cannot protect Indigenous peoples in Canada from being subject to the rule of an imposed political authority. Contrastingly, Borrows' freedom as mobility provides a mechanism for addressing all of these aforementioned problems and so is a better foundation for Indigenous rights than its two counterparts.

Isaiah Berlin & Negative Liberty

If asked what it means to be free, many people would probably say something about being left alone to do as they wish. This notion of non-interference is the cornerstone of one popular liberal conception of liberty commonly referred to as "negative liberty".[11] Berlin tells us that an agent enjoys negative liberty to the extent that others do not interfere with the agent's desired actions.[12] Here, the only actions that should concern us are actions that are actually available to or possible for the agent.[13] To illustrate this conception of liberty, Berlin employs the metaphor of "open doors". He

[10] Taiaike Alfred, *Wasase: Indigenous Pathways to Action and Freedom* (Peterborough: Broadview Press, 2005) at 20. The rest of the quote reads: "by confronting the disconnection and fear at the core of our existences under colonial dominion".

[11] While Berlin certainly contributed to the popularization of the term "negative liberty", he was not the first to employ it. See George Crowder, *Isaiah Berlin: Liberty and Pluralism* (Cambridge: Polity Press, 2004).

[12] Berlin, *supra* note 1 at 169.

[13] *Ibid* at 169–170.

states that, "the extent of a man's negative liberty is […] a function of what doors, and how many, are open to him".[14]

While this conception of liberty coincides in many ways with our common-sense views, a number of scholars find this notion of liberty unsatisfactory. While one can find numerous criticisms of this conception in the literature, these critiques generally focus on two related issues: status and security. With regards to the former issue, some scholars are critical of the fact that conceptualizing liberty as non-interference does not ensure that agents are immune from being accorded statuses (e.g. that of a slave or a ward) that seem to be irreconcilable with some of our basic intuitions about freedom.[15] This criticism is often illustrated vis-à-vis the case of the contented slave. The case of the contented slave describes a situation wherein a master, for a variety of reasons (e.g. benevolence, sloth or ignorance), does not ever actually interfere with his slaves. As a result, his slaves are able to go about their daily business as they see fit. If one holds a negative conception of liberty, it would be possible (and correct) in this instance to declare that the slaves are free. Obviously, this is very troubling because slaves, by definition, are not free agents (i.e. they are another person's property). Many scholars find this unsatisfactory, arguing that a proper conceptualization of liberty must include constitutive elements that preclude this possibility.[16] According to the critics, the lesson to draw from the case of the contented slave is that an acceptable version of freedom must not be compatible with holding the status of a slave or its equivalents. If we think about this last point in terms of the relationship between interests, rights, and duties, we can infer the following conclusion: when the interest of freedom is equated with non-interference, people hold rights that generate duties in others to leave them alone, but these same rights do not generate duties in others that preclude the assignment of certain (problematic) statuses.

Aside from the problem of status, some scholars are also concerned about the limited degree of security guaranteed by negative liberty. According to these scholars, conceptualizing liberty as non-interference does very little to ensure that agents feel secure in their freedom. More specifically, these critics argue that when it comes to

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[14] *Ibid* at 41.

[15] Richard Bellamy, "Republicanism: Non Domination and the Free State" in G Delanty and SP Turner, eds, *Handbook on Contemporary Social and Political Theory* (Routeledge, 2011) at 3. The example of the slave is generally employed in these critiques of negative liberty because slaves manifest the following characteristics: 1) slaves are denied rights enjoyed by other adult persons because they are considered to be inferior human beings or not human at all; 2) slavery is a legal status; and 3) slavery is an unchosen status. I raise this point to highlight that it is these characteristics that give the critiques of negative liberty argumentative force, not slavery in and of itself. Thus, I believe that other statuses, assuming they embody similar characteristics, would also yield the same conclusions as the case of the contented slave. Above, I include holding the status of a ward. Here I have in mind children who become orphaned and end up in state care or adults who become mentally incapacitated and become wards of the state or the responsibility of some designated person. Of course, the diminished rights accorded to wards are not justified by appeals to their lack of humanity. However, these individuals' limited set of rights are generally justified by citing their inability to exercise the capacities (usually associated with reasoning) that most other adult humans are able to employ. In short, the rights limitation arguments parallel the ones employed in the case of slavery.

[16] Philip Pettit, *Republicanism: A Theory of Freedom and Government*, (Oxford: Clarendon Press, 1997) at 31–35 [Pettit, *Republicanism*].

freedom it is not enough simply to experience an absence of interference; an agent must have a reasonable basis for believing that interference will not occur. The critics go on to explain that this belief is essential in order to ensure that people do not feel pressured to exercise their freedom in a manner that tracks other people's interests and preferences instead of their own.[17] The following explanation may clarify this last statement. If agent X *can* interfere with agent Y, then agent Y may behave in ways that she believes will stop agent X from interfering. In this scenario, even if agent X never *actually* interferes, we can say that agent Y's freedom is not secure. Her freedom is not secure because her behaviour is partially, or maybe even completely, governed by external interests and preferences (i.e. the interests and preferences held by agent X). For some scholars, this sort of preference adaptation is not a mark of freedom but a mark of its absence.[18] If we turn to the relationship between interests, rights and duties we can see a familiar pattern to the one described above. When freedom is equated with non-interference, people hold rights that generate duties in others to leave them alone, but these duties are not enough on their own to ensure the person holding the right feels confident to act in a way that actually serves their own interests and preferences.

I will now assess the degree to which these general criticisms of negative liberty apply when we focus specifically on the case of Indigenous peoples in Canada. It is not far off the mark to advance that over the course of the last few decades some Indigenous nations have secured various degrees of negative liberty. This is best illustrated vis-à-vis the (very slowly) increasing number of arrangements between the settler state and Indigenous peoples concerning self-administration and self-government. In Canada these arrangements would include opportunities for Indigenous self-administration that come out of legislation like the *First Nations Land Management Act* and opportunities for self-government that come out of modern treaties like the *Nisga'a Final Agreement*.[19] While the exact nature and scope of these arrangements differ in important ways, these arrangements establish a legal framework within which Indigenous nations and communities are, to various degrees, left alone to govern or administer themselves. In other words, these agreements spell out rights that generate duties of non-interference by government and non-Indigenous Canadians.[20]

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[17] Philip Pettit, "Freedom and Probability: A Comment on Goodin and Jackson" (2008) 36:2 Philosophy and Public Affairs 206 at 212–216.

[18] *Ibid* at 216. Pettit calls this phenomenon "liberation by ingratiation".

[19] Thomas Isaac, "First Nations Land Management Act and Third Party Interests" (2005) 42:4 Alta L Rev 1047 at 1049. The *First Nations Land Management Act,* SC 1999, c 24 [*FNLMA*] facilitates Indigenous self-administration of certain lands. Thomas Isaac explains that "the FNLMA relates to the process by which First Nations can establish a land code and thereby remove their reserve lands from the control of the Minister of Indian Affairs and Northern Development (Minister), under the authority of the *Indian Act*". For an analysis of the degree and effectiveness of self-government offered by the *Nisga Agreement* see Jeff Corntassell, "Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse" (2008) 33:1 Alternatives 105 at 106–108.

[20] More specifically, treaties create treaty rights and their corresponding constitutional duties. The *FNLMA*, on the other hand, does not create constitutional rights and duties of this sort, but it can impact the nature and scope of rights held by Indigenous persons. For example, Christopher Alcantara argues that the *FNLMA* can be an instrument for strengthening the individual property rights of Indigenous persons living on-reserve

However, when we take a closer look at these arrangements, we find problems that parallel the ones identified above. First, in terms of status, even assuming that these arrangements could in some way establish a degree of non-interference that would satisfy both Canadian governments and Indigenous peoples, a sphere of non-interference is not sufficient on its own to guarantee a change in legal and political status. That is, regardless of the existence of these spheres of non-interference Indigenous peoples have remained citizens of the Canadian state in the ordinary way, whether they want this status or not. And, there are numerous instances of Indigenous persons expressing their desire to abandon this status or to see it modified in foundational ways.[21] For example, Audra Simpson advances that the Mohawks of Kahnawa:ke "insist on being and acting as people who belong to a nation other than the United States and Canada".[22] For his part, Larry Chartrand states that "Canadian citizenship was not something my people agreed to have; it was forced upon my Métis ancestors".[23]

At this point, one may question whether it is right to draw a parallel between being a slave or a ward and Canadian citizenship. After all, a significant degree of the force of argument here depends on these statuses being similar in some fundamental way. In my view, when our concern is Indigenous peoples and Canadian citizenship, there are a number of reasons for advancing that this parallel is on solid footing. First, from 1876 to at least the 1960s, the *Indian Act* rendered Indigenous persons who fell under its jurisdiction, for all intents and purposes, wards of the state. As Lesley Jacobs argues, the "Indian Act viewed Indians as wards of the state, incapable of managing their own affairs, and appropriate subjects of paternalistic measures designed to serve their own best interests, even if Indians themselves contested that such measures were really in their own best interests".[24] For his part, Grand Chief Ovide Mercredi referred to this legislation as "the 'Big Brother' *Indian Act*" and went on to describe how it is "a cradle-to-grave set of rules, regulations and directives" governing the lives of a significant portion of the Indigenous population.[25] When referring to this period, given

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because the land codes that come out of this legislation can impact the three common ways individuals gain possession of reserve lands (that is, by affecting customary rights, certificates of possession and leases). See Christopher Alcantara, "Reduce Transaction Costs? Yes. Strengthen Property Rights? Maybe: The First Nations Land Management Act and Economic Development on Canadian Indian Reserves" (2007) 132:3 Public Choice 421 at 424, 431.

[21] Joyce A Green, "Canaries in the Mines of Citizenship: Indian Women in Canada" (2001) 33:1 Can J of Political Science 715 at 720; John J Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 110 [Borrows, *Freedom & Indigenous Constitutionalism*].

[22] Audra Simpson, *Mohawk Interruptus: Political Life Across the Border of Settler States* (Durham: Duke University Press, 2014) at 2.

[23] Larry Chartrand "Indigenous Peoples: Caught in Perpetual Human Rights Prison" (2016) 67 UNBLJ 167 at 167.

[24] Lesley Jacobs, "Mapping the Legal Consciousness of First Nations Voters" in Jerry P White, Julie Peters, Dan Beavon et al, eds, *Aboriginal Policy Research: Voting, Governance, and Research Methodology, Volume X* (Toronto: Thompson Educational Publishing, 2011) at 13.

[25] Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Penguin Books Ltd, 1993) at 80–81.

the state of the law, drawing a parallel between Canadian citizenship and holding the status of a ward is certainly permissible.[26]

Second, many scholars argue that certain types of groups have a moral claim to self-determination and so are entitled to decide which political authority will rule over them, even though individuals, on their own, are not usually accorded this right.[27] Some of these same scholars advance that nations are groups of this sort.[28] Now, in the literature, a right to self-determination is not absolute. Philosophers would say that the right is defeasible. The point, however, is that all other things being equal, groups like nations have a right to self-determination and so are morally entitled to determine who should rule them.

The Indigenous population in Canada is composed of individuals from a number of national groups. As a consequence, these Indigenous nations, like all nations, have a right to decide who should rule them. Historically, these nations were incorporated into what became the Canadian state without their consent. Canadian citizenship was imposed on the members of these nations in spite of the protests of these nations.[29] The parallel between slavery or wardship and Canadian citizenship is appropriate here because in both types of cases the agent's moral autonomy is violated. In the case of slavery and wardship, the moral autonomy of the slave and the ward is violated because no one asks them for permission to rule over them. In fact, imposed rule is at the heart of what it means to be a slave or a ward. In the case of Canadian citizenship, a non-Indigenous political authority violated the moral autonomy of Indigenous nations (i.e. their right to self-determination) by subjecting these nations to its rule without their consent. And, not unlike the case of the slave or the ward, imposed rule is an important part of what it means to be a settler state.

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[26] Some will correctly point out that the *Indian Act* never applied to the entire Indigenous population, and so the reach of the argument is limited to those who were subjected to the authority of this legislation.

[27] Generally scholars hold that individuals are entitled to a limited set of rights on this score, including, for example, the right to be accorded equal, formal membership in a political community, and the right to exit a political community. Political philosophers of the anarchist variety argue that individuals do in fact have a right to decide which political authority (if any) will rule them. See John A Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979). For scholars like John Simmons, any collective right to make this determination is derivative and comes from the rights of individuals.

[28] Margaret Moore, *The Ethics of Nationalism* (Oxford: Oxford University Press, 2001) at 52–73. Here, the term "nation" is employed in the manner put forward by David Miller. For Miller, a nation is characterized by a number of features including: feelings of solidarity among members; shared culture and institutions; associative duties; and attachment to a homeland. See David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge: Harvard University Press, 2016) at 27–28. Miller advances that such an understanding of the term "nation" allows those who hold a national identity to "explain why they belong together and why they should exercise their citizenship in this particular place". In my view, Indigenous peoples are members of nations of the sort characterized by Miller.

[29] Chartrand *supra* note 23 at 168 (Chartrand describes this process of forced political incorporation in the following manner: "Ever since we were unilaterally absorbed into the Canadian state machine we have been resisting Canadian colonization and fighting for recognition as a distinct sovereign people. By the force of settlement and the imposition of British/Canadian sovereignty, followed by the visible manifestation of effective governance control (along with its monopoly on legal violence) in our territory we called home, we became Canadian citizens. But we did not abandon our Métis culture and identity and yes, we continue to resist our political inclusion into a nation-state that is not of our own choosing" at 168).

Thus, there are at least two good reasons for believing that it is appropriate to draw a parallel between Canadian citizenship and slavery or wardship. This means that an understanding of freedom that cannot provide resources for challenging the notion that Indigenous peoples in Canada are simply citizens in the ordinary way, whether they want this status or not, is a problematic conception of liberty. And, as we saw above, negative liberty with its emphasis on non-interference is not all that helpful on this score.

Leaving aside the issue of status, a subsequent problem is that, to date, the aforementioned arrangements have not provided a form of negative liberty that is secure. Stated somewhat differently, even though these arrangements are supposed to create spheres of non-interference, these spheres have, thus far, proven permeable. Settler governments can and do interfere. At this point, some may rightly point out that, at least as far as treaties are concerned, the spheres of non-interference that are created by these arrangements are protected by the Constitution.[30] However, there is a great deal of scholarship that illustrates the significant imbalances between Indigenous peoples and the government when they are engaged in litigation. Indigenous peoples are at a significant disadvantage in terms of resources when they take the government to court and this disadvantage makes litigation an unappealing and sometimes unrealistic option. Alfred concludes that "the intransigence of the Settler has been a profitable strategy, as [Indigenous] groups have found it extremely difficult to continue to push for their demands in the face of the multiple strategies of delay, distraction and containment employed by state governments".[31] If these scholars are correct about litigation – one of the most significant mechanisms for protecting treaties – and I believe they are, it is hard to argue that the spheres of non-interference established by treaties are secure in the sense outlined above.

Spheres of non-interference created by legislation do not benefit from the type of constitutional protection afforded to treaties and so they are even less secure. Borrows advances that by the early 2000s, the debate over legislation on Indigenous self-government in Canada took a very disturbing turn. He concludes that the "policy debate on aboriginal governance has largely turned away from the issue of loosening or overthrowing unjust Canadian government oversight within those communities and towards strategies to increase oversight within those communities by creating further mechanisms for control".[32] In other words, the discourse on self-government which would seem to be about creating spheres of non-interference became an instrument for attempting to justify policies that would allow for more government control over Indigenous communities.

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[30] For example, Section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 provides protection to both existing Aboriginal rights and treaty rights.

[31] Alfred, *supra* note 10 at 158.

[32] John J Borrows, "Measuring a Work in Progress: Canada, Constitutionalism, Citizenship and Aboriginal Peoples" in Ardith Walken & Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books Ltd, 2003) at 115.

An example may serve to illustrate the extent of possible government interference. In 2011, the federal government imposed a third-party financial manager on the community at Attawapiskat against the expressly stated wishes of community members and the Indigenous government.[33] This event exposed the degree of insecurity of the non-interference held by this Indigenous nation. Moreover, it suggests that when Indigenous governments do not behave in a way that traces the interests and preferences of the federal government, the federal government has the legal right (and, apparently, the will) to intervene. This possibility would seem to place pressure on Indigenous communities to engage in preference adaptation; for many scholars, this sort of pressure is not compatible with freedom.

To summarize, while in some cases the settler state either willingly, or as a result of legal obligation, provides Indigenous peoples a degree of negative liberty, the rights and duties that result are insufficient. These rights and duties do not address the status issue which is important to many Indigenous nations. Along the same lines, these rights and duties do not provide a secure form of freedom. Thus, there are good reasons for advancing that negative liberty is not a good way of understanding this basic human interest when our concern is Indigenous peoples and the settler state.

Philip Pettit & Republican Liberty

In the last decade or so, the republican version of liberty has become increasingly popular among political philosophers working in the Anglo-American tradition. For republican scholars, liberty is about not experiencing domination or, more simply, "non-domination".[34] In what follows, I focus on the work of Philip Pettit who is of one of the most ardent defenders of republicanism and its version of liberty.

What does it mean to say that liberty is constituted by non-domination? According to Pettit, this understanding of liberty boils down to not having a master (or its equivalent) and, thus, not being subject to arbitrary interference.[35] Here, interference is arbitrary "to the extent that I have the capacity, not subject to your direct or indirect check, to interfere in [your] choice, and I can employ that capacity to make it more probable, defiance apart, that you will choose to my pleasure".[36] In this instance, interference is still a problem for those concerned about liberty, but not all interference is problematic. Only arbitrary interference is a threat to freedom.

For Pettit, domination (holding a slave-like status and so being subject to arbitrary interference) is the product of the exercise of two types of power: *imperium*

[33] For specific details regarding the powers of a third-party manager and the legal framework for the federal government's actions in the case of Attawapiskat see the *Default Prevention and Management Policy, 2011*.

[34] Skinner, *supra* note 1; Frank Lovett, *A General Theory of Domination & Justice* (Oxford: Oxford University Press, 2010).

[35] Frank Lovett and Philip Pettit, "Neorepublicanism: A Normative and Institutional Research Program" (2009) 12 American Rev of Political Science 11 at 12.

[36] *Ibid* at 14.

and *dominium*. The former describes the public power of the state, while the latter describes the "private power of interference that certain agents, individual and collective, enjoy in relation to others".[37] In order for citizens to enjoy freedom as non-domination, *imperium* and *dominium* must be kept in check.[38] Pettit's work on the republican state is, among other things, a treatise on the requisite rights and duties for securing this form of liberty.[39]

There are many different critical accounts of Pettit's work on liberty in the literature. Here, I focus on Patchen Markell's critique. According to Markell, Pettit's treatment of liberty is problematic because it cannot provide a sufficient account of the injustices associated with empire.[40] Markell argues convincingly that empire is unjust because it treats people as if they were, on the one hand, slaves, and so denies them control over their lives and, on the other hand, children, and so denies them involvement in making decisions that affect their lives. In short, empire robs people of two important goods: control – that "the course of action be responsive to your interests, not determined by another's whim" – and involvement – that "whatever it is that's happening, and however it's being controlled, […] it [is] happening through you, through your activity".[41] According to Markell, Pettit's concept of non-domination does an admirable job of exposing, as well as supplying resources for addressing, the control aspect of empire, but does very little with regards to the involvement aspect.[42] Markell argues that Pettit's conception "seems to promise ultimate control over a course of affairs at the expense of active involvement in it".[43]

This leads Markell to insist that if we are concerned about empire, we need to be concerned with domination *and* usurpation.[44] We need, in other words, to acknowledge that empires do not simply rob people of control through domination but that they also displace existing social and political orders through usurpation.[45] The important insight to draw from Markell's critique is that even if an empire managed to create political orders in their subject territories that somehow ensured that those who lived within them were not dominated, these political orders would still be unjust. They would be unjust because they owe their existence to the successful, coercive

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[37] Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford: Oxford University Press, 2001) at 152.

[38] *Ibid*.

[39] Pettit, *Republicanism, supra* note 16.

[40] Patchen Markell, "The Insufficiency of Non-Denomination" (2008) 36:1 Political Theory 9 at 11.

[41] *Ibid* at 12.

[42] *Ibid* at 23.

[43] *Ibid*. Markell claims that "power could be problematic not only because it was arbitrary or unchecked – not only because of the vertical relationship of control it established between commander and commanded […] but also if it was unduly concentrated; that is, because of the horizontal distribution of involvement it established between those who held imperium and those who did not" at 25.

[44] *Ibid* at 25–26.

[45] *Ibid* at 26.

displacement of prior political orders. In short, imperial political orders are unjust not only because of what they do (i.e. because they dominate colonial subjects) but also because of how they came about (i.e. because they are the products of usurpation).

In terms of rights and duties, the implication of Markell's work is that rights that aim at protecting freedom as non-domination would create duties that would work to eliminate instances of domination between political authorities and citizens and citizens and each other. However, these rights would not generate duties that address the historical development of the political authorities. And so, under Pettit's account of liberty, we are free from domination but not free from imposed political orders.

Markell's critique of Pettit is significant for the case under consideration because empires are connected in fundamental ways to settler states. In order to become empires, Portugal, Spain, France, Britain, and other European powers usurped the political authority of many nations around the globe. Empire is not possible without usurpation. In some instances, these European states were content to simply administer particular subject territories (e.g., the British in India). Over time and usually with a great deal of effort, these subject territories gained their independence and became sovereign states. The political authority of the original inhabitants was restored.

In other instances, some of these European states encouraged their European subjects to settle in their subject territories even though nations already inhabited these lands (e.g., the French in North America). Over time, these subject territories with settler populations went on to gain political independence from the imperial metropole and became settler states. However, unlike in the case described above, the political authority of the original inhabitants was not restored upon independence. In this case, when independence was achieved, the beneficiary was the political authority of the European settlers.

Canada is not an exception. Its historical development followed this sequence of events and reveals how Europeans usurped the political authority of Indigenous nations. Borrows advances that in some cases "Indigenous lands and resources were 'taken' without treaties or other agreements".[46] He goes on to explain that "[e]ven in the parts of the country where treaties were signed, Indigenous peoples experienced broad denials of their freedom and autonomy to land, governance, and other vital resources".[47] All of this leads Borrows to conclude that "Indigenous peoples have long withstood government assertions of authority over them by avoiding, attacking, and refusing to recognize Crown land claims and the Crown's assertion of sovereignty".[48] Here, Borrows is putting forward that the historical development of the setter state's political authority is very important for understanding the conflict between the settler state and Indigenous nations. Of import at this juncture is the claim

[46] Borrows, *Freedom & Indigenous Constitutionalism*, *supra* note 21 at 107. Here, the word taken is placed in quotes because that is how it appears in the original text.

[47] *Ibid*.

[48] *Ibid*.

that some important Indigenous claims (e.g. Indigenous challenges to the Crown's sovereignty) turn on what the settler state *is*, not only what it *does*.

Thus, if our concern is the freedom of Indigenous peoples currently residing in settler states we should care about two things. We should care about what the settler state does with its political authority (e.g. the way its policies and programs impact Indigenous peoples). And, we should also care about how the settler state secured its political authority in the first place. Given the analytical task at hand, what we want to know at this point is whether conceptualizing liberty as non-domination can generate rights and duties that address these two concerns.

Recall that Markell argues that Pettit's account of liberty is problematic because, while it can protect us from non-domination, it cannot protect us from usurpation and the possibility of being subject to imposed political authorities. Unfortunately, Markell's argument holds even when the imposed political authority takes the form of a settler state instead of an empire. My basic claim is that liberty as non-domination may produce rights and duties that protect Indigenous peoples from domination (at least in theory). But, liberty as non-domination does not produce rights and duties that protect Indigenous peoples from the imposed political authority of the settler state. Thus, there are good reasons for advancing that Pettit's view of liberty is not a very good understanding of this basic human interest when our concern is Indigenous rights.

John Borrows & Freedom as Mobility

There are certainly a number of scholars who argue that concepts, theories, approaches, etc., that are drawn from non-Indigenous sources are not often, or ever, appropriate when the concern is Indigenous peoples and the settler state.[49] According to Borrows, a version of this position is held by those who embrace what he calls 'strategic essentialism'. Borrows describes how some scholars, activists and practitioners "have stopped reading and referencing non-indigenous work because they say it colonizes and contaminates their thought and action".[50] Borrows, however, holds that engagement with a plurality of ideas, concepts, theories, approaches, etc. can be both illuminating and valuable.[51]

[49] For some compelling examples of these arguments see Glen Coulthard's rejection of the concept of recognition in *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) or D'Arcy Vermette's critique of employing a doctrinal analysis approach to understanding the law in "Colonialism and the Problem of Defining Aboriginal People" 31:1 Dal LJ 211 at 213.

[50] Borrows, *Freedom & Indigenous Constitutionalism supra* note 21 at 24.

[51] *Ibid.* Borrows seems to have a very inclusive view when it comes to philosophical traditions. Namely, he thinks that no one philosophical tradition has a monopoly over what is right or good. He states that "[w]e cannot afford to pour our futures into the mould of any one Western or Indigenous philosophy, theory, or approach. They may all be helpful" at 18. I agree with Borrows but there is not enough room here for a proper defense of this position.

Borrows' latest book, *Freedom & Indigenous Constitutionalism*, is an important example of this sort of engagement.[52] What is of import for us is that in this work Borrows analyzes different concepts of freedom drawn from Indigenous and non-Indigenous sources and the impacts of these different understandings on the relationship between Indigenous peoples and the settler state. Borrows' analysis leads him to advance a distinctive view of freedom; a view that turns on intellectual and physical mobility that is mediated through traditional practice.[53]

In terms of the first part of Borrows' conception of freedom, he claims that "intellectual and physical *mobility* is a major issue that Indigenous peoples encounter in struggling for freedom and a good life".[54] The argument is that the settler state regularly bars (both literally and figuratively) Indigenous peoples from certain intellectual and physical locations, as well as creating significant obstacles to Indigenous access to these spaces. In terms of physical spaces, Borrows illustrates the many ways in which Indigenous peoples are separated from and denied access to their traditional territories.[55] Indeed, a major chapter of the book explores the question of whether Indigenous nations can enhance their freedom by denying non-members access to their traditional territories and the resources located therein.[56] In terms of intellectual spaces, Borrows points to things such as the settler state's reliance on stereotypes as authoritative sources of knowledge about Indigenous peoples, as opposed to knowledge claims advanced by Indigenous peoples themselves.[57] Continuing with the spatial metaphor, these stereotypes work to trap Indigenous peoples in a (fictional) past.

In terms of the second part of Borrows' conception of freedom, he claims that satisfactory forms of intellectual and physical mobility are connected to traditional practices. Aside from the important fact that his overall concept of freedom (i.e. freedom as mobility) is inspired by traditional Anishinaabe practices, Borrows argues that traditional practices mediate Indigenous people's freedom. He offers the following by way of explaining how tradition connects to physical and intellectual movement: "Indigenous peoples' physical orientation to the world often occurs in relation to enduring patterns, despite the presence of significant flux. As with our physical travels, so it is with our ideological wanderings: we are not rootless. Our journeys through the world of ideas can take guidance from familiar, time-honoured patterns".[58] In fact, Borrows advances that one important freedom-based goal is "to

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[52] Borrows, *Freedom & Indigenous Constitutionalism*, *supra* note 21.

[53] *Ibid*. There are, of course, many Indigenous philosophical traditions and Borrows is obviously aware of this fact. In his book he draws primarily on the traditions of the Anishinaabe nation, of which he is a member. In terms of the non-Indigenous philosophical traditions, his focus in the book is on Western, Anglo-American philosophy at 4–5.

[54] *Ibid* at 20.

[55] *Ibid* at 27–35.

[56] *Ibid* at 50–102.

[57] *Ibid* at 27–35.

[58] *Ibid* at 22.

live throughout our own territories, in accordance with our long-standing patterns of movement".[59] While traditional practices have a central role to play, Borrows is careful to clarify that just because a practice is traditional, this does not mean that it is beyond contestation. On the contrary, given the connection between traditional practices and freedom, Borrows takes the view that these practices must be open to contestation and change.[60]

From Borrows' view, an essential element of freedom is the ability to move as seamlessly as possible from one intellectual space to another or one physical place to another. As Borrows' himself explains:

> Indigenous mobility might be enhanced by simultaneously testing the real limits, *and* challenging limits that seem real, but which are the product of stereotyping and other essentialized subconscious forms of thought and practice. My approach illustrates a 'form of' possible crossing over (*franchissement*) of one or the other boundaries' that constrain Indigenous freedom.[61]

From this view, one's freedom is related to the ease with which one navigates the boundaries of the limits placed on intellectual and physical mobility. And, an important part of this navigation includes one's ability to participate in the making and revising of these boundaries. As Borrows states quite early on in his book, "[f]reedom […] is the ability to work in cooperation with others to choose, create, resist, reject, and change laws and policies that affect your life".[62]

This way of approaching the conceptualization of freedom is similar in some respects to the way in which critical theorists such as Clarissa Hayward approach this important human interest. In her work on freedom and power, Hayward argues that "people should be, not only the subjects, but also the architects of key boundaries that delimit and circumscribe their fields of action".[63] She goes on to explain that we are free "to the extent that [power relations] enable *all* participants to effectively take part in making and re-making their terms, and enable participants to act upon *all* key standards, ends, and other boundaries comprising them".[64] While Borrows' conception of freedom reserves an important place for traditional Indigenous practices, it shares similar end goals with Hayward's conception. Both conceptions are concerned with people's capacity for action, as well as their ability to shape the context within which that action occurs.

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[59] *Ibid* at 31.

[60] *Ibid* at 40–41.

[61] *Ibid* at 20.

[62] *Ibid* at 12.

[63] Clarissa Rile Hayward, *De-Facing Power* (Cambridge: Cambridge University Press, 2000) at 166.

[64] *Ibid*.

Given the conception of rights employed in this paper, it is important to outline the rights and duties supported by Borrows' understanding of freedom. Freedom as mobility informed by traditional practice would create rights that empower Indigenous people to reconstruct the basic terms of the relationship between their nations and the settler state. Borrows' understanding of freedom would also create obligations on the part of the settler state to facilitate this Indigenous participation when Indigenous nations wish to exercise these rights.

Moreover, this particular set of rights and duties could be tools for solving the serious problems identified in the discussion of the other two varieties of liberty. The problems resulting from the liberal conception of liberty, that is, being saddled with an unwanted status and being subject to interference, have a chance of being resolved to the satisfaction of all parties if Indigenous peoples could participate in the construction of the rules and norms that govern this status and spheres of non-interference. Along the same lines, the problem highlighted in the analysis of republican liberty, the fact that the settler state's political authority is the product of usurpation, could also be addressed vis-à-vis the participation of Indigenous peoples in the construction of rules and norms. What I have in mind here is a situation wherein this historical reality anchors discussions about rules and norms. When Indigenous peoples and the settler state attempt to engage in the sorts of discussions described here, the question should be "which rules and norms work, in light of this history of usurpation?" Acknowledging the importance of this history is a vital step towards reconstructing the relationship between Indigenous nations and the settler state. Sadly, it seems to me that the current *modus operandi* when the settler state engages in these sorts of discussions with Indigenous nations is, instead, framed by the question, "which rules and norms work, *in spite* of this history?" This question is premised on the idea that what happened in the past does not have any moral weight and so should not affect the present. Thus, until the former question takes the place of the latter question, Indigenous peoples will, most likely, have to continue their struggle for freedom.

Conclusion

In this paper I explored the relationship between three different accounts of freedom, the rights and duties generated by these accounts, and the strength of the normative case for employing each account as the basis for Indigenous rights. Specifically, I examined Berlin's work on negative liberty, Pettit's work on freedom as non-domination and Borrows' work on freedom as mobility. The analysis demonstrated that the liberal and republican conceptions of liberty are not adequate foundations for rights when our concern is Indigenous peoples in settler states like Canada. Negative liberty is problematic because, first, it cannot generate rights that would enable Indigenous peoples to challenge their status as citizens of the settler state, and second, because it cannot generate rights that would create a secure form of negative liberty. For its part, liberty as non-domination is problematic because it cannot generate rights that address the wrong of usurpation and so cannot protect Indigenous peoples from being subject to the rule of an imposed political authority. Contrastingly, Borrows' account of freedom as mobility, does a much better job than its two counterparts.

Freedom as intellectual and physical mobility, informed by traditional Indigenous practices provides tools, in the form of rights and duties, for addressing the problems that are manifest in the other two conceptions of liberty. As a consequence, Borrows' understanding of liberty is an excellent resource for constructing Indigenous rights.